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MEDICO-LEGAL TESTIMONY*

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FOR many years, in my capacity as chief surgeon of a large electric railway company, I have had the opportunity to hear much medico-legal testimony, and also to read many of the court transcripts of such testimony. The bulk of this testimony is, in my opinion, the honest and sincere conviction of the medical expert. On the other hand, a not inconsiderable part of medico-legal testimony is at such variance with the actual facts that one is forced to the conclusion that the witness must either be ignorant of the medical facts as obtain in the case in question, or his standards of veracity are at a low ebb indeed. I am not critical of the medical witness who is incompetent, or the one who perhaps, in his desire to give his patient the benefit of any doubt, becomes a partisan to the cause. The medical witness that I do criticize is the one who brazenly and defiantly gives downright dishonest testimony.

MEDICAL WITNESS HERE DISCUSSED

It is with the latter type of medical expert witness that I am concerned, for it is he who has created an impression not only unfavorable, but also unfair, to the medical profession as a whole.

Judge Charles Fricke in an address delivered before the Los Angeles County Medical Society in 1930 had this to say, in part, about medico-legal testimony:

"Much as we may deplore it, the fact remains that the general public has a lack of confidence in medical testimony, and that this sentiment exists in the minds of many jurors and, to an extent at least, in the minds of the judges.

"The fact that this impression is largely unwarranted does not alter the unfortunate situation. But since it does exist, it must be met; as far as it is unwarranted, it must be overcome; and in so far as it is justified, an effort should be made to overcome the cause. Until this is done, every medical expert called as a witness must not only give his testimony, but must also overcome any prejudice which may exist in the minds of those members of the general public who have to pass upon his testimony."

Thus the medical profession stands charged by an able jurist; it, therefore, behooves the profession not to remain supine and complacent in the face of such charges, but, on the contrary, to be up and doing something to remedy the evil.

DEFINITION OF MEDICO-LEGAL TESTIMONY

Medico-legal testimony may be defined as the giving of evidence in court, under oath, of such facts as are found after a searching and exhaustive investigation of the case in question. An expert medical witness is an individual selected by the court or parties in a cause, who, possessing special knowledge and experience (as distinguished from common or judicial knowledge) in medicine and surgery, is permitted to give his opinion, based upon an assumed state of facts, with the thought that his conclusion or judgment is to be of value in settling the point at issue.

THE JURY'S PROBLEMS

The medical question for the jury to decide in personal injury suits is extent of injury and the probability of its permanency.

The extent of injury is a question of fact, and is usually testified to by the attending physician. Special issues and other reasons demand the use of medical expert witnesses in many, if not in most personal injury suits. Their opinion, based upon the facts in evidence, is a most important part of the testimony. Being an opinion, it can only have weight when the jury is convinced that it is honest conviction based on careful observation and experience, and given without bias.

Probably no expert in a personal injury suit is credited by the jury as being absolutely impartial. It would be well for experts to bear in mind that from the moment they take the stand they are assumed to be more or less prejudiced; that if by their testimony, or their manner of giving it, they strengthen such an assumption, they injure more than they help the side for which they appear.

In testifying as to the permanency of the conditions found in the plaintiff, the law does not

* From the Medical Department of the Pacific Electric and Los Angeles Railway Companies.

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require the witness to state beyond a degree of reasonable certainty, the court holding that "medicine is far from being an exact science." The chances of recovery in a given case are more or less affected by unknown causes and unexpected contingencies, and the wisest physician can do no more than form an opinion based upon a probability.

POINTS A MEDICAL EXPERT SHOULD OBSERVE

In giving medical expert testimony technical terms should be avoided, and when used their meaning should be explained or illustrated. The witness should not engage in a contest of wits with the opposing counsel, and under no circumstances should he lose his temper. His answer should follow the question promptly, but he should not permit himself to be led into hurried answers in his cross-examination. Many questions are put which do not permit a direct "yes" or "no" answer. Under such circumstances the witness should state that he can only answer qualifiedly and is entirely justified in maintaining that position, however insistent the cross-examiner may be in having a categorical answer.

If the expert has personally examined the plaintiff, he is expected to give the details of his examination, and then his opinion. Very thorough examinations are advisable, even when the condition is obvious; for if the expert can be shown to have been hurried or superficial, his testimony can be greatly weakened on cross-examination.

Often when the expert has examined the plaintiff, and always when he has not, his testimony is brought in relation to the case by means of a hypothetical question. The hypothetical question is founded on the facts in evidence, which have been testified to by the various witnesses. The expert is required to accept as true the assumptions made in the question, notwithstanding the fact that he is not responsible for the truth. Thus, it may happen on cross-examination that he is obliged to express an opinion based on facts he believes to be untrue. This loophole, also, makes it easily possible for unscrupulous experts to give favorable testimony based on assumptions that he knows to be untrue.

The hypothetical question requires answers as to whether the accidents described were adequate to cause the symptoms subsequently complained of, what those symptoms indicate, and whether or not they will be permanent.

CREDIBILITY OF EXPERT MEDICAL WITNESSES

The credibility of expert medical witnesses, and the weight of their testimony, are for the jury to decide; it may be disregarded by the jury if the latter is convinced that such testimony is not correct; but how are the jurors to know whether or not medico-legal testimony is correct when in so many instances exactly opposite views are expressed?

Here is where the credibility, honesty, and common decency of the medical expert witness are at stake. The witness must be a man basically honest and not to be swayed from his honest opinion, or one who will not give ridiculous or illogical conclusions. For an opinion to be competent and acceptable as evidence, the mental operation involved in its production must have as its basis rationality and reasonableness; remote possibilities or conjectures are never used as its basis.

The medical man, when he enters the contentious atmosphere of a court, must be aware of being inoculated thereby and made a partisan. For, while it may be natural for an employer to minimize a disability occasioned by injury, and for the injured to exaggerate its degree, it is not the office of the expert to take sides.

As Beaumont of Bath has rightly expressed it:

"Pity may almost unconsciously bias him in favor of an unfortunate workman or injured person; indignation may prejudice him against a man whom he believes to be a malingerer. Both must be ruthlessly cast on one side; he must obliterate all humanizing tendencies, and, leaving the legal rights to be safeguarded by the law, he must deal impartially with the abstract medical problem alone."

WHY MEDICO-LEGAL TESTIMONY IS SOMETIMES IN ILL-REPUTE

For many years medico-legal testimony has been the subject for much writing and discussion, and not without reason. There have been times when the malodorous effluvium emanating from the decadent carcass of a medico-legal trial has reached to the high heavens.

It is on account of this sort of testimony that I am forced to the conclusion that medico-legal testimony only too often is obtained at a price that is prohibitive, perhaps not so much from the viewpoint of the so-called medical expert witness who is usually well paid for his services, but prohibitive that in many instances it is a reflection directly upon the integrity and ability of the expert witness, and indirectly upon the profession as a whole.

It seems to be an occasional custom in the United States not to call as a witness any physician who, after examining a party to a suit at the solicitation of one of the attorneys, informs the attorney that his conclusions are not favorable to his side, but rather to call an expert whose testimony can be counted upon as favorable to that side. In other words, there are medical men who can be relied upon to give such testimony that the plaintiff's attorney knows will be favorable regardless of the known facts, or of such facts readily ascertainable after careful examination.

On the other hand, I know of any number of high-class and skilled physicians who refuse to examine a personal injury case because of the odium attached to the medico-legal conflict that is almost always certain to arise during the trial.

When a so-called medical expert is ignorant, careless, or incompetent (and many such qualify as experts and testify day after day), his defects can easily be exposed by an astute cross-examination; but where the medical expert is shrewd or has ability, and is hired to give dishonest testi-

mony, or to disagree with the other experts, then his testimony may, and often does, exercise considerable influence. Thus, honest difference of opinion does not, in a majority of cases, account for the difference in testimony.

The question of the abuse of medico-legal testimony has occupied the time and minds of men of both legal and medical professions for many years. That such testimony is an absolute necessity in many cases there can be no doubt; also, there is often room for honest difference of opinion, concerning which there can be no criticism. But when such opinion is not founded on basic facts as pertain to medicine and surgery, when exaggerated statements are made, when ridiculous deductions are given, when false reasoning and clever manipulation of scientific facts are allowed to enter as testimony, then does a medical witness reflect discredit upon himself and the profession as a whole.

IS THERE A CURE FOR THE CHAOS EXISTING IN MEDICO-LEGAL TESTIMONY?

What is the cure for the chaos in which medico-legal testimony finds itself? That there is a great need, perhaps not so much for more knowledge among our experts, but for more honesty, there can be no doubt.

At any rate, there exists a real problem; one that has baffled the best minds of both professions for many years, and one which today seems to be just as difficult of a satisfactory solution as ever. However, this apparent difficulty should not deter us from making persistent efforts to clear the way for a better understanding among the members of both professions.

The responsibility for the miscarriages of justice in our courts of law today are shared equally by the medical and legal professions. In fairness to the legal profession, I must say that they seem to be more drastic in their actions toward their delinquent members than are the members of the medical profession toward their erring brothers.

There should be some means by which a physician, testifying as an expert, could be held to account for testimony which differs from that of all known authorities. Medical societies ought to pay careful attention to expert testimony given by members of the medical profession, and to draw the attention of the courts to such testimony if it is at variance with facts in the possession of medical science.

Quoting from the Honorable Judge Bartlett of New York:

"The proper remedy for such evils in medico-legal testimony lies in adequate amendments in the code of ethics by which physicians and surgeons regulate their own conduct. You can decree in your code that a certain course of conduct of a medical expert witness shall be deemed honorable and professional, and that a certain other course of action shall be deemed dishonorable and unprofessional; by commanding medical experts to do what is right, and by subjecting them to professional censure and obloquy if they do what is wrong."

MEDICAL AND LEGAL PROFESSIONS BLAMEWORTHY

Thus it would seem that the onus is squarely put up to the medical profession by an able and distinguished lawyer. However, while I personally feel that in the main the doctors themselves are largely to blame for the stigmata of degenerated medical testimony thrust upon them, the lawyers, too, must share in the censure.

I blame the lawyers to the extent that, by assuming the rôle of his satanic majesty, they place before a low moral-fibered doctor a temptation too great for him to resist. Most lawyers know of certain doctors whom they employ regularly who are willing to spew their perjured testimony in accordance with the desires of the attorney and his client.

The lawyer is not supposed to know, nor to be able to interpret and evaluate, the extent of injury or sickness; hence, of necessity he must depend upon a physician for help. However, regardless of the incompetency of the attorney to evaluate the medical aspects of the case, I have never known of one to undervaluate the probable financial worth of a personal injury case.

I do blame the doctor without reservation who aids and abets in any case in obtaining undeserved compensation, by reason of dishonest, illogical, or distorted medical testimony. The doctor is supposed to know, and he should know the medical facts of the case; his testimony should be concerned only in the giving of such facts and nothing else.

On the other hand, I am sure that the great mass of the medical profession are men of integrity and whose opinion cannot be purchased at a price. The cure lies in the hands of the men who are called as medical witnesses. It is incumbent upon them to give such testimony that when the musty transcript records of the court trial are exposed to the scrutiny of their colleagues, they can face them unashamed, and with the knowledge that their testimony at least was sincere and honest.

A SUGGESTED REMEDY

But until the weaker members of the medical profession attain this high degree of moral courage, the profession as a whole must make efforts to clear the muddy waters that now embroil the noblest of professions.

As a remedy, I suggest that the Medico-Legal Committees of the various county medical societies submit a list of qualified experts to the various judges; the judge, with the approval of the defendant and the plaintiff, will call three of the experts to examine the plaintiff and render a joint report, giving in detail and in language easily understood by the lay jury the real facts of the case. Should the jury disregard the findings of the court doctors, then the judge should immediately set the verdict aside and grant a new trial.

Miscarriages of justice in medico-legal cases are not always due to dishonest or partisan medical testimony. Sometimes such occurrences are due to the fact that the usual lay jury is com-

posed of persons not properly qualified to pass on medical questions; or the medical testimony, though sincerely and undoubtedly honestly given, may be so erroneous as to cause a grave miscarriage of justice, and especially when given by men who qualify as experts and whose opinions, therefore, may have much weight with the jury.

REPORT OF CASES

Examples of two such cases that came before the courts in Los Angeles within the last few years prompted me to analyze each one carefully and thereby bring to light much interesting and useful information.

Both patients received but minor injuries; each one sued for large amounts, the one obtaining $30,000 which, together with the costs incidental to the trial, brought the entire amount to over $40,000 that the defendant corporation had to pay. In this case the doctors employed by the corporation testified that the man was recovered from all of his physical injuries; that he was suffering from a psychoneurosis, and that upon conclusion of the trial he would soon recover.

The plaintiff's doctors, on the other hand, testified that he was, to a large extent, permanently injured. The final decision in this case caused one of the railway investigators to wonder how there could possibly be such diametrically opposite medical testimony as advanced by the various doctors; surely some were right, but which he did not know; and in order to clarify the situation he was encouraged by the railway company to make an investigation of the plaintiff after the conclusion of the trial.

He found that the man had disappeared from his usual haunts, and was nowhere to be found. However, about two months later he found him in Mariposa County, where he had purchased a gold mine and was vigorously engaged in all the arduous pursuits that the assembling and erecting of mining machinery entail.

Motion pictures were taken during a period of two days, unbeknown to the then recovered plaintiff, and which proved beyond question that the man had recovered. There was, of course, no financial redress, but there surely was obtained a moral victory in the satisfaction of proving that the man was not seriously or permanently injured, and that the doctors who testified on behalf of the railway were correct in their interpretation of the case.

The other case, despite the testimony of his medical experts to the effect that he was suffering from a severe and disabling injury, was frustrated in his unreasonable demands for $78,000, by the showing of motion picture films which definitely proved this plaintiff to be an unmitigated liar and his doctors in profound error. These films were taken at various times during the month immediately preceding his trial. They were put in evidence after his own doctors had testified as above noted; and although they were mute, they were most eloquent testimony in proving the rascality of the allegedly injured man.

418 Pacific Mutual Building.

DISCUSSION

Attorney Joe G. Sweet (405 Montgomery Street, San Francisco).—As a lawyer, I have spent a good portion of many years as a trial defense counsel in ordinary negligence actions and also in malpractice cases. In this capacity, I have been an interested spectator, with an advantageous position on the sidelines.

I agree with Doctor Weber that every effort should be made to eliminate the dishonest and the ignorant from the ranks of the medical profession. Much may be done by the profession itself, but when all that is humanly possible has been done, a considerable number of the unfit will remain. This will be true of all professions so long as humanity remains fallible.

Large verdicts are not awarded healthy persons solely because of the incompetency or dishonesty of the physicians testifying in their behalf. In all too many cases the award comes as the result of an honest mistake of a well-trained medical man.

It is my opinion that much of the trouble arises from too much credulity on the part of the physician in taking the history of the person under examination. The examining physician does not sufficiently take into consideration the difference in value of the histories of the paying patient who voluntarily comes in for treatment and the claimant in a tort action who is attempting to recover high compensation for his injury.

The physician is justified in believing that the regular patient has any pain indicated, or what is just as important, that he thinks he has. It is fair to assume that the patient is not going to pay for the privilege of attempting to deceive the doctor.

On the other hand, the patient who is referred to a doctor representing a defendant occupies an entirely different position. Probably before arrival he has been coached by another physician, or by an attorney skilled in the trial of negligence cases. More frequently than is thought, he has made some independent study concerning the affliction from which he claims to be suffering and has trained himself to deceive. His statement of suffering is entitled to little weight unless independent physical findings confirm.

The problem that now confronts the profession is to develop new and efficient means for determining the truth of what is told. An actual case that I have in mind will perhaps illustrate the correctness of what I here say.

In the case I have in mind, plaintiff was injured on September 23, 1930. X-ray films taken immediately following the injury showed a "right anterior rotary displacement of the first cervical vertebrae on the second." On September 25, 1930, the dislocation was reduced and the x-rays showed "that the dislocated first cervical had been replaced to its normal position."

The case came to trial in April, 1933. The plaintiff presented a pitiful appearance in court. His step was uncertain and his head was tilted forward on a rigid neck. He contended that he was unable to raise his arms above the level of the shoulders. The head movements were greatly limited. He also complained of difficulty with sight and hearing.

Over a period of years prior to trial, he was examined by physicians representing his Workmen's Compensation carrier. His doctors were not of his choosing and it was to their interest to find that he was malingering, if such were the case. Both examiners were men of ability and of unquestioned integrity.

As the result of examinations made on November 20, 1931 and September 12, 1932, and also immediately before trial, the examiners reported the patient to be totally disabled.

Prior to trial the defendant placed a motion picture operator on the trail of the plaintiff. Pictures were produced at the trial and showed him romping with his sweetheart, raising his arms above his head, and going through all motions that could be made by any normal healthy man. Another set of pictures showed

him rowing a boat upon Stowe Lake. Following the presentation of these pictures in court, the plaintiff was convicted of perjury and sentenced to jail.

This is just one of many cases in which a plaintiff has completely deceived the examining physicians. After nearly twenty years of experience in the trial of negligence cases, I am coming more and more to the opinion that an astonishing number of permanent injuries, if studied with a motion-picture camera before trial, or if followed and studied after trial, would reveal just what this motion-picture operator fortunately found before it was too late.

PHILIP STEPHENS, M.D. (1136 West Sixth Street, Los Angeles).—I think the best lesson to be learned by this most excellent paper of Doctor Weber's is a simple fundamental fact, namely, that when on the witness stand we should state facts. In other words, tell the simple unvarnished truth when we can, and qualify our statements if it is necessary to do so, and not allow our opinions to be swayed by either side in the case; to never, by any word or statement, give any judge or jury the faintest reason to suspect that we are what is known as a paid advocate, a thought which is always in the mind of, at least, the jurors, largely due to the fact that we are summoned by either one side or the other in the case; that it is neither right nor honest to favor, or show a tendency to favor, plaintiff or defendant, whether a private individual or corporation, rich or poor, by word or deed. In short, justice should be blind, but the law looks to us to properly evaluate the degree of disability and we should attempt to do it honestly and with favor to none.

A great deal of his paper could have been gotten from any medical jurisprudence, but the advice relative to its application and practical use is, without question, invaluable, and we hope that much of the information contained therein will be presented again and again so that all doctors may be sufficiently informed, and act so that at least some of the odium which we have borne in the past, in the matter of medical testimony, may be forever removed. We are glad to note the sincere effort on the part of the legal fraternity and Bar Association to coöperate with us, and to be working with us toward that end.

THE MEDICAL AND SURGICAL ORGANIZATION AT BOULDER DAM*

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DISCUSSION *by R. A. Bowdle, M.D., East Ely, Nevada; R. F. Palmer, M.D., Phoenix, Arizona; J. C. Geiger, M.D. San Francisco.*

THE physical organization of construction programs heretofore has seldom afforded an opportunity for the coördination and the complete centralization of the various phases of work such as come under the head of Industrial Medicine and Surgery, as has been the case at Boulder Dam.

An attempt is here being made to enumerate and evaluate the subdivisions of industrial work, particularly in regard to public health problems, water supply, sewage disposal, school problems, industrial hygiene and safety, first aid, surgical repair, compensation insurance, hospital management, and medical legal aspects, as they have presented themselves on the project which is being constructed by the Six Companies Inc.

*Presented at the thirty-first annual meeting of the Nevada State Medical Association at Reno, Nevada, September 22, 1934.

CIVIC SET-UP AT BOULDER CITY

Boulder City was established and built by the Department of Interior through the Bureau of Reclamation in 1931 on part of what has been designated as the Boulder Canyon Project Reservation, which is located in the southern-most portion of Nevada. It is situated twenty-four miles from Las Vegas, Nevada, at an elevation of 2,500 feet, and is eight miles from the site of the Boulder Dam which is being constructed in the Black Canyon of the Colorado River. It is connected with Las Vegas by a paved highway and a branch of the Union Pacific Railroad. Electricity is brought to the city from Riverside, California, 225 miles distant, by a direct high-voltage transmission line. The city is governed by a city manager, who is employed by the Secretary of the Interior. Policing of the city and the entire reservation is in the hands of Federal officers. Originally the plans called for a city of about 3,500 people; the present population is more than six thousand. Upon completion of the construction work, only a small portion of the city will remain with an estimated population then of from five to eight hundred people. Permanent structures include a modern, air-cooled hotel and a theater, some commercial houses, school, hospital, Bureau of Reclamation office and dormitory, municipal buildings, and a few residences.

The Bureau of Reclamation is the designer of the Dam, with Walker R. Young in charge as construction engineer. The Six Companies Inc. are the builders of the Dam, with Frank T. Crowe in charge as superintendent of construction. The contract price for the completion of this portion of the Boulder Dam project is $49,000,000. The Babcock and Wilcox Company hold the contract of $11,000,000 for the steel piping used in the tunnel linings.

PUBLIC HEALTH ORGANIZATION

As health officer it is necessary to correlate various requirements of federal, state, and city regulations. Centralization gives a smooth, efficient organization, which at all times has received the unqualified support of all three agencies.

Garbage removal is effected through its collection in the early hours of the morning in properly equipped and, where necessary, covered vehicles, and it is disposed of by incineration and use as food for hogs in near-by communities.

Food handlers employed in the stores, restaurants, fountains, and commissary are examined as to the presence of skin disease and venereal infections. Physical cleanliness and proper sterilization of equipment used in these places of public service are demanded.

The graded school has an attendance of about seven hundred pupils, and approximately nine hundred children of the preschool age live in the city. A full-time school nurse is employed whose activities are directed toward the care of the general health of the school child in regard to supplementary feedings for the undernourished, inspection of the children for possible acute infections, eye trouble, and static deformities. Her